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No. 99-6615

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED ~~STATES~~

OCTOBER TERM, 1999

MICHAEL WAYNE WILLIAMS, *Petitioner*,

v.

JOHN B. TAYLOR, WARDEN, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, GEORGIA, ILLINOIS, INDIANA, MARYLAND, MASSACHUSETTS, MISSOURI, MONTANA, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WASHINGTON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a State prisoner has "failed to develop the factual basis of a claim in State court proceedings," for purposes of applying the prohibition against federal court evidentiary hearings under new 28 U.S.C. §2254(e)(2) and the statutory exceptions, if he did not properly present the facts to the State court, regardless of the reason he did not do so.

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INTEREST OF AMICI CURIAE

Amici are States charged with the responsibility of enforcing their criminal law and defending final state criminal convictions. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) helps insulate those convictions from attack in the federal courts; and new Section 2254(e)(2) of Title 28 of the United States Code guarantees that the state courts will have the first opportunity to review the bases for such attacks in a timely way in orderly state procedures. Diminution of the proper scope of Section 2254(e)(2) would undermine important interests of comity and finality. Amici submit this brief in support of the respondent in this case, through their respective Attorneys General, under this Court's Rule 37.4.

SUMMARY OF ARGUMENT

In enacting the habeas corpus reforms contained in the AEDPA, Congress achieved two basic goals. It elevated the role of the State courts, making their consideration of the petitioner's claims determinative in almost all cases. At the same time, it curtailed the power of the federal courts, streamlining their procedures and narrowing their jurisdiction to grant relief to the rare case. In accomplishing these ends, Congress took the lead from this Court, which already had recognized, in the interests of finality and comity, many substantial restrictions on the availability of the writ even for potentially meritorious constitutional claims.

As with the other habeas reforms adopted in the AEDPA, Section 2254(e)(2) of Title 28 is designed to limit relief in

the federal courts. In flatly prohibiting federal evidentiary hearings on the factual bases of claims not properly presented to the State courts, Section 2254(e)(2) provides a new and valuable protection for the important policies underlying the "exhaustion of State remedies" and procedural bar doctrines previously formulated by this Court. Further, it provides an effective weapon against the "morphing" of old claims into new and different ones after the commencement of federal proceedings. Section 2254(e)(2) in these ways re-strikes the balance, in favor of the States but with due regard for the petitioner, between finality and comity and the protection of the innocent. The new statute allows a hearing on belated claims with undeveloped facts only in cases presenting strong innocence-related proof.

The threshold condition for the operation of Section 2254(e)(2)—*i.e.*, "if the applicant has failed to develop the factual basis of a claim in State court proceedings"—is fulfilled whenever the facts were not properly presented to the State court during the period in which the State court's doors would have been open to hear the petitioner's claims on their merits. Because the onus obviously is on the petitioner to avoid a presumptively-correct, final State court judgment and sentence, an "unachieved condition" of factual development logically must be ascribed to the petitioner and properly must be described as his failure. Even if that conclusion were not plain, the structure of Section 2254(e)(2) would dictate the same result, for it explicitly treats excusable failures—where the factual predicate "could not have been previously discovered through the exercise of due diligence"—as a basis for an exception to the evidentiary-hearing prohibition. It would make no sense to

treat it that way if the prohibition were not even applicable in the first place.

Nor does Section 2254(e)(2) imply that federal courts should peer over the shoulder of the co-equal State judiciary and second-guess how State standards for funding, discovery, evidentiary hearings, etc., were applied in individual cases. Congress determined to trust the State courts to deal fairly with federal claimants, and set out no federal standards for the State courts to meet in affirmatively promoting collateral attacks on their own criminal judgments. Second-guessing and distant scrutiny of State-law decisions by federal courts would be inimical to that trust and beyond the competence of the federal judiciary.

Although petitioner in this case presents no substantial claim that the State unconstitutionally suppressed evidence until it was too late for him to develop the facts in the State courts, Section 2254(e)(2)'s prohibition against evidentiary hearings would govern such a claim. The statute broadly proscribes hearings on undeveloped claims, of any type, and provides innocence-related exceptions in the areas of "new" retroactive rules of law and factual bases that could not have been discovered with diligence. A claim of unconstitutional suppression of evidence, governed generally by the statute, could fit into the statutory exceptions if serious enough. Because petitioner in this case "failed to develop" the facts, and admits that he cannot meet the statutory exceptions, the Fourth Circuit reached the correct result in rejecting his petition without an evidentiary hearing.

ARGUMENT

Section 2254(e)(2) Prohibits A Federal Evidentiary Hearing to Prove Alleged Facts Not Fairly Presented in State Court by the Petitioner, Regardless of Why They Were Not Presented, Unless He Meets the Exceptions Built into the Statute

Background of Section 2254(e)(2)

Two waves of modern reforms restricting the ancient writ of habeas corpus have helped restore the writ to its proper place in our federal system. This Court was the vanguard of the first wave. In a long series of cases, it recognized compelling justifications for a variety of limitations on the availability of the writ for novel constitutional claims, *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plur. op.), for Fourth Amendment claims, *Stone v. Powell*, 428 U.S. 465, 492-4 (1976), for claims flouting state procedural rules, *Coleman v. Thompson*, 501 U.S. 722, 740-51 (1991), and for claims raised in piecemeal fashion, *McCleskey v.* Zant, 499 U.S. 467, 487 (1991), or otherwise belatedly in federal court, *O'Sullivan v. Boerckel*, 526 U.S. 838, ___ (1999); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 12 (1992) . See also *Calderon v. Thompson*, 523 U.S. 538, 554-9 (1998); *Brecht v. Abrahamson*, 507 U.S. 619, 635-9 (1993). To be sure, this Court never lost sight of the writ's value as a safeguard against fundamental miscarriages of justice resulting in the conviction of innocent people, see *Murray v. Carrier*, 477 U.S. 478, 496 (1986); but it likewise "never defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial

free of constitutional error," *Kuhlmann v. Wilson*, 447 U.S. 436, 447 (1986). In reforming habeas corpus by disallowing certain classes of claims, even if meritorious, this Court demonstrated renewed respect for the States' interest in finality in criminal law and for the conscientiousness with which the "co-equal" State courts seek to enforce the federal rights of criminal defendants. *Sawyer v. Smith*, 497 U.S. 227, 241 (1990); see *Abrahamson*, 507 U.S. at 636.

Four years ago, Congress was the vanguard of a second wave of fundamental reforms, embodied in the AEDPA. The clear plan and purpose of the AEDPA's reforms in state-prisoner cases was to elevate the importance of the State courts' role in adjudicating federal claims and to circumscribe dramatically the later role of the federal courts in the process. The AEDPA's habeas corpus reforms uniformly venture beyond this Court's earlier, similar jurisprudence. Thus, the AEDPA imposes, for the first time, a "statute of limitations" for the initiation of habeas corpus proceedings by state prisoners. 28 U.S.C. §§ 2244(d), 2263. It broadly prohibits federal relief on claims "adjudicated on the merits" in State courts, excepting only cases of the most obvious error. § 2254(d). It tightens, beyond this Court's own restrictions, standards for allowing second or successive petitions. §§ 2244(b), 2266(b)(3)(B). It does away with prisoner appeals based upon non-constitutional grounds. § 2253(c). It rejects exceptions, traceable to an opinion by this Court, to the "presumption of correctness" accorded to state-court factfinding. § 2254(e)(1). And, in capital cases in qualifying States, it further narrows many of its own general restrictions, and imposes strict time-limits upon the federal court's review of State convictions. §§ 2263, 2264, 2266 et seq. Consonant with this Court's modern jurisprudence, the

two hallmarks of the Congressional reforms are: one, well-placed trust that the State courts will faithfully enforce the accused's constitutional rights in criminal trials and post-conviction procedures; and, two, the reservation of the federal writ for the rare case involving only the most egregious malfunction of State processes, especially if it results in punishing an innocent person. See *Thompson*, 523 U.S. at 558 (AEDPA's "central concern" is that a concluded criminal proceeding "not be revisited" absent "a strong showing of innocence"); see also § 2254(d).

Purpose and Operation of Section 2254(e)(2)

Those same policies underlie the particular reform at issue in this appeal: the AEDPA's outright prohibition against federal evidentiary hearings, except in narrowly-defined circumstances, to adjudicate facts that had not been developed in state court proceedings. In this provision, again, Congress has taken habeas corpus reform a further step in the direction already marked by this Court's own cases. New Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that— (A) the claim relies on—(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim

> would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The provision addresses a chronic problem—the sudden presentation, for the first time in federal rather than state court, of new alleged facts as the bases for federal claims. This problem lies at the focal point of the AEDPA's goal of intensifying reliance upon the State courts as the "main event" in habeas corpus cases. Congress and this Court have consistently demanded that a petitioner "fairly present" both the legal and the factual bases of his federal claims in state court before proceeding to federal court. 28 U.S.C. § 2254(b); *Gray v. Netherland*, 518 U.S. 152, 163 (1996). Recognizing the tendency of prisoners to seek to avoid the State courts, which are most knowledgeable about their own cases, this Court has insisted that exhaustion of remedies in State court be "serious" and "meaningful." *Tamayo-Reyes*, 504 U.S. at 10. But habeas corpus petitioners nevertheless flout the "fair presentation" requirement in hopes of seeking what they perceive as a friendly forum—or, in capital cases, as a way of dragging out the proceedings and delaying execution of the sentence.

Because the AEDPA contemplates that State proceedings will almost always be determinative, see *Thompson*, 523 U.S. at 558, the prisoner's temptation to avoid State court has become much stronger. Some prisoners hope that alleging new facts in support of a claim in federal court might evade the AEDPA's new rule barring relief, except in extreme circumstances, for claims "adjudicated on the merits" in state court. § 2254(d); see

Terry Williams v. Taylor, No. 98–8384 (cert. granted, 4-5-99; oral arg., 10-4-99). Similarly, petitioners are tempted to try to avoid the AEDPA's enhanced presumption of correctness for state court findings on factual issues. § 2254(e)(1). At the same time, prisoners feed on the inappropriate largess of some federal courts that allow unjustified discovery or that pay for unfocused "fishing expedition" investigations to drum up new pretexts, never presented to the state courts, for attacking final and presumptively correct state convictions. E.g., *Calderon v. United States District Court (Thomas)*, 144 F.3d 618, 621 (9th Cir. 1998) (allowing discovery on unexhausted claim); *Calderon v. District Court (Gordon)*, 107 F.3d 756, 761-2 (9th Cir. 1997) (allowing investigative fees to pursue unexhausted claims after dismissal of federal petition); *In re Robbins*, 18 Cal.4th 770, 783, 790, 77 Cal.Rptr.2d 153 (Ca. 1997) (federal discovery allowed on unexhausted claim).

A recent Price-Waterhouse-Coopers report, commissioned by the Administrative Office of the United States Court, adumbrates the costs of the problem that Section 2254(e)(2) helps to solve. In reviewing "open" capital habeas corpus cases over 1992-98, the report found that the average cost of the initial federal-petition stage was $129,363, and that the average cost of the subsequent evidentiary-hearing stage was another $54,594. "Cost of Private Panel Representation in Federal Capital Habeas Corpus Cases from 1992 to 1998" (Feb. 9, 1999), pp. vi-viii, V-40-43, 70-76, VIII-119. However else one might criticize such large expenditures to attack final State judgments, it is safe to say that the funding disserves comity and federalism and the legal doctrines requiring fair presentation of claims in the State court prior to federal proceedings, not to mention

the deleterious effect on accuracy wrought by factual disputes asserted after finality of the State judgment. Still less would "business as usual" along these lines in the federal court serve Congress' intent, in enacting the AEDPA and Section 2254(e)(2), of trusting the States and minimizing the role of federal review.

Sometimes, more by design than by accident, new "facts" insinuate themselves by stealth into the federal case at the post-petition or evidentiary hearing stages. Once adduced through the effort and expense associated with evidentiary hearings, see Price-Waterhouse-Coopers Report, *supra*, the new fact allegations reconfigure the original claims and build up an inertia that shapes the ultimate decision, despite the lack of development in the State court. For example, in *Weaver v. Thompson*, 197 F.3d 359, 364-5 (9th Cir. 1999), the petitioner in the federal evidentiary hearing "morphed" the fact basis of his claim from an allegation that a bailiff had coerced his jurors to hurry and return a verdict in one day, to the allegation that, even though the jurors knew there was no time limit, the bailiff instead had told them they must reach verdicts on all counts. The Ninth Circuit dismissed the State's objection as "hairsplitting"; but it was the new evidentiary-hearing fact that, in the appellate court's view, justified relief.[1] *Id.*

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[1] In capital habeas corpus cases, the problem is exacerbated. Habeas corpus petitions in California death-penalty cases, for example, typically comprise hundreds of pages of convolution. The petitioners' apparent purpose is to maintain maximum flexibility in fitting into the original construct of the petition any new evidence adduced at later stages of the federal proceedings, when any appetite for strict enforcement of exhaustion and procedural-bar rules is at its lowest ebb.

The AEDPA affords the States new protections against these metamorphoses, overt or subtle, in the factual bases of federal claims. Alone and in combination with other reforms, new Section 2254(e)(2) helps obviate uncertain inquiries about whether new fact allegations materially alter a claim so as to render it unexhausted and unavailable to petitioner under Section 2244, see *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); similarly, it works to render immaterial the question whether a claim asserted in federal court differs from a claim "adjudicated on the merits" in state court so that the claim arguably might remain available notwithstanding Section 2254(d). Now, regardless whether new facts might change the nature or the strength of the federal claim, Section 2254(e)(2) imposes a flat threshold proscription against proving the new facts in the federal court at all. Except in the rare circumstances outlined in the statute's exceptions, the facts upon which state relief was denied will be the only facts the federal court will consider in federal habeas corpus proceedings.

Another benefit of the approach fostered by Section 2254(e)(2) is that, along with related AEDPA reforms, it further discourages so-called "ping pong" games, see *Harris v. Reed*, 489 U.S. 255, 269-70 (1989) (con. op., O'Connor, J.), in which petitioners delay ultimate resolution of the federal case while they return to State court with new claims. For example, new Section 2254(b)(3) shields the States from unintended, judge-imposed forfeiture of "exhaustion" defenses, and thus reduces the risk that new facts ultimately will serve as the basis for federal relief. And new Section 2254(b)(2) permits rejection of the petition with prejudice even if it contains unexhausted claims. These new provisions work in tandem with Section 2254(e)(2) so that,

in cases where the petitioner still might have access to the State court with his new fact allegations, he will bear a heightened risk of being forever precluded from proving his claim if he improperly chooses to seek federal relief first. Notwithstanding the appearance of new facts or factual allegations in the course of federal proceedings, the State in such cases may defer exhaustion defenses under Section 2254(b)(3), and rely primarily upon the flat proscription in Section 2254(e)(2). The claim, to the extent based upon any new or "unexhausted" facts, thus would fail on the merits for lack of proof under Section 2254(b)(2), see *Breard v. Greene*, 523 U.S. 371, 376 (1998), without any temporary dismissal of the petition for a time-consuming "ping pong" round of litigation in the state courts.

More obvious than its effect on unexhausted claims or claims "adjudicated on the merits" in State court, and even more important, is the direct effect of Section 2254(e)(2) on new facts that no longer may be presented to the State court. It is in this context that petitioner Williams' case arises. Under Section 2254(e)(2), a petitioner in such a circumstance cannot prove new facts in a federal evidentiary hearing, unless he meets the statutory exceptions. In restricting belated proof of new facts in this way, Section 2254(e)(2) conforms with the AEDPA's main purpose of strengthening the comity and finality protections recognized in this Court's own procedural-default opinions. As acknowledged in the ACLU amicus curiae brief (ACLU Br. 16-17), Section 2254(e)(2)'s operation in this regard generally parallels the workings of the procedural rule constructed by this Court in its pre-AEDPA decision in *Keeney v. Tamayo-Reyes*, 504 U.S. 1. Under *Tamayo-Reyes*, a state prisoner must establish "cause and prejudice," see

Wainwright v. Sykes, 433 U.S. 72, 87 (1977), or sufficient proof of "actual innocence," see *Schlup v. Delo*, 513 U.S. 298, 313-32 (1995), before obtaining an evidentiary hearing for facts never developed in state court proceedings. Under Section 2254(e)(2), a petitioner cannot obtain a hearing, if he did not develop the facts in state court, unless he shows, first, that the legal basis (A)(i) or the factual basis (A)(ii) of his claim had been unavailable. Second, he must make an innocence-related showing beyond establishing "that it is *more likely than not* that no reasonable juror would have convicted [the petitioner] in the light of the new evidence," *Schlup*, at 327 [emphasis added]; instead, the petitioner must show that "the facts underlying the claim would be sufficient to establish by *clear and convincing evidence* that *but for the constitutional error*, no reasonable factfinder would have found the applicant guilty of the underlying offense," § 2254(e)(2)(B) [emphasis added].

A Petitioner "Fails to Develop" the Facts Whenever He Does Not Properly Present Them to the State Court

Petitioner, like the ACLU, portrays the provision as interpreted by the Fourth Circuit in this case as too harsh or radical, and asks that it be mitigated by judicial construction of the "failed to develop" language in paragraph (e)(2) so that the provision would be deemed wholly inoperative unless the gap in the State record had been "attributable to petitioner" (Pet. Br. 20-21) rather than "the State's fault" (ACLU Br. 6, 10-14). Under these views, apparently, the provision would be inapplicable unless the State acquiesced in the petitioner's demand for affirmative public assistance—in the form of money, discovery, or an

evidentiary hearing—in attacking his final judgment of conviction. (See Pet. Br. 20-28; ACLU Br. 11.) Nothing in the language of the provision, or the evident plan of the AEDPA, would support such a view.

Petitioner points out that the Section 2254(e)(2) prohibition depends upon whether "the applicant has failed to develop" the facts in State court, and asserts that he did not "fail" to do so. Amici agree with Virginia's well-reasoned explanations of why the plain meaning of the disputed statutory language, "if the applicant has failed to develop the factual basis of a claim in State court proceedings," denotes nothing more than "if the applicant has not developed the factual basis of a claim in State court proceedings." (Resp. Br. 18-19.) Petitioner is the only party who would initiate an attack on the conviction. He is charged with the legal burden of proving sufficient grounds to set aside his conviction. And, certainly, he uniquely bears the consequences if his conviction and sentence remain in place. In this case, undeniably, petitioner did not develop the factual basis for his current claims in state court. The most natural and accurate description of these circumstances, given the onus of the consequences, is that petitioner "failed to develop" the facts. As reflected in petitioner's cited dictionary definitions, to "fail" includes "leaving . . . some possible condition unachieved." (Pet. Br. 27.) Here, the "unachieved condition" was the development of a factual basis for petitioner's claims.

Petitioner exaggerates when he says that the term "failed to develop" had a settled-meaning that Congress inferably adopted in enacting the evidentiary-hearing reform. He cites the use of the term in the *Tamayo-Reyes* case. (Pet. Br. 28 n.22.) But, although the factual context in which that case

arose was one involving apparent neglect in taking full advantage of an evidentiary hearing held in State court, this Court's opinion does not suggest that its holding would apply only in that context. Besides, in considering when a petitioner may obtain a federal evidentiary hearing, this Court earlier had decided that the entitlement depended upon whether the petitioner "deliberately bypassed" the State's processes. *Townsend v. Sain*, 372 U.S. 293, 317 (1963) (adopting *Fay v. Noia* standard). In *Tamayo-Reyes*, the Court rejected that standard in a case involving apparent negligence. The concept had hardly settled into a term of art.

In any event, as Virginia also demonstrates in its brief (Resp. Br. 17-19), petitioner's interpretation of "fail" would render meaningless and self-contradictory the specific statutory provision, in Section 2254(e)(2), for an exception to the evidentiary-hearing prohibition based upon a showing that "(A) the claim relies on . . . (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence . . . ." Under petitioner's view—that the "failed to develop" provision describes only negligent petitioners—Section 2254(e)(2) would give with one hand and take away with the other: it would offer only to the "truly negligent" petitioner an opportunity for an evidentiary hearing if he could show he had not been truly negligent. The ACLU brief glosses over the point in a footnote in its amicus brief, and honors the statutory-interpretation principle in breaching it. (ACLU Br. 11, fn. 14.) The federal court of appeals opinions cited by petitioner (Pet. Br. 26-27 n. 19) do not discuss this important point at all, and are rendered even less persuasive because of the omission.

Nor would it be harsh or unprecedented to interpret "failed to develop" as applying to a petitioner who, for whatever reason, simply did not develop the facts in state court proceedings that only he would initiate. Petitioner, it should be noted, volunteers that he would not be immune from the special evidentiary-hearing requirements described in this Court's *Tamayo-Reyes* rule, a rule similar to that of Section 2254(e)(2). While complaining that the State failed to aid and affirmatively interfered with his ability to present the facts in State court, he concedes that, in seeking a federal evidentiary hearing, he still must meet the heightened "cause and prejudice" or "miscarriage of justice" prerequisites enforced in *Tamayo-Reyes* before his constitutional claim may be heard. (Pet. Br. 37.) If that is so, there is no reason he should be immune from the similar presumptive restriction on evidentiary hearings imposed by § 2254(e)(2). This Court, indeed, has required habeas corpus petitioners to meet the "cause and prejudice" and "miscarriage of justice" standards for defaulted constitutional claims, even where the critical omission in state court proceedings was not the petitioner's doing, but the incompetence of his lawyer. E.g., *Coleman*, 501 U.S. at 752-4. The lawyer's incompetence does not establish good "cause" under this Court's precedents, unless it occurred in criminal proceedings in which the State bore a constitutional duty to provide competent counsel to the accused. See *id*. There has long been a recognition, expressed first in this Court's precedents and ratified now in the AEDPA, that some valid constitutional claims well might not be heard in federal court for procedural reasons having little or nothing to do with the interests protected by the claimed constitutional right or with factors within the petitioner's personal control.

The ACLU brief proffers what it favors as a "sensible" view of how a provision like Section 2254(e)(2) should work. (ACLU Br. 9.) The policy judgment, however, belongs exclusively to Congress, *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996); and its decision to tighten judge-made law by enacting a provision that operates in the sensible way amici States and Virginia have described cannot be second-guessed and displaced. On the question of what would have seemed sensible to Congress, a logical consideration is the likelihood that a diligent petitioner unearthing important evidence of a constitutional violation in his trial will be unable to "develop the facts" in State court proceedings in the first place. State courts provide counsel at trial and certainly in a first appeal as well. *Ross v. Moffitt*, 417 U.S. 600 (1974). Each State provides, among other protections, meaningful procedures for collateral attacks on criminal judgments, including widespread opportunities for appointment of counsel and other assistance. (Appendix.) Congress recognized that, given modern State procedures and well-founded trust in the State courts, lack of development of a factual basis for a claim fairly should be ascribed to the petitioner in the first instance. Section 2254(e)(2), therefore, treats lack of development as the petitioner's "failure." In such cases, petitioner must overcome the jurisdictional bar to a federal habeas corpus evidentiary hearing by meeting the section's explicit exceptions.

Section 2254(e)(2) Does Not Depend Upon the Federal Court Second-guessing the State Court's Rulings on Funding, Discovery, and Evidentiary Hearings

Misleading nevertheless is the suggestion (ACLU Br. 14-15), that the proper interpretation of Section 2254(e)(2) depends upon recognition that the States then have a "duty" to affirmatively aid or fund collateral attacks on their criminal judgments and that the reform provision was intended to operate only where the states discharge "responsibilities that Congress thinks they should have." As noted above, amici do not deny that the States, through their own law, voluntarily provide meaningful appellate and collateral-attack review of criminal judgments for unconstitutional errors in criminal cases. (Appendix.) And amici here agree that Congress, like this Court before it, recognized the value of the States' processes and the States' faithfulness to their constitutional duties when it accorded State proceedings its new central role in federal habeas corpus review under the AEDPA. But this Court has never said that States have a federal "duty" to provide for collateral attacks on their criminal judgments in their own courts. Cf. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Congress' policy decision to place great trust in the states would be undermined if it were seized as an excuse for the federal courts to "peer majestically over the state court's shoulder," *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990), to re-consider whether the trust is justified and to re-evaluate, in individual cases, whether a habeas petitioner established any entitlement to state funding, state discovery, or state evidentiary hearings under applicable state law. Those judgments are exclusively the

province of the State rather than the federal courts, *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975), and second-guess scrutiny by the federal court is the very opposite of trust. In any event, federal courts lack competence to second-guess the nuanced decisions of state courts under the varying state-by-state standards that govern state collateral proceedings.[2] Here, Section 2254(e)(2) envisions, at most, nothing more than that the doors of the State court will have been open to hear the merits of a timely-presented federal claim.

Any further suggestion that Section 2254(e)(2) depends upon federal review of the adequacy of any particular state proceeding is also undermined by the structure of the AEDPA. Where Congress meant to make a statutory benefit available to the States only if they adhered to particular guidelines—a true "incentive structure" (cf. ACLU Br. 15)—Congress spelled them out in detail and made the conditional nature of the benefit explicit. Thus, in the AEDPA's adoption of special restrictions on the writ in capital cases under Chapter 154 of the Judicial Code, §§

[2] Similarly, in the area of court-created bars against claims forfeited under state procedural law, this Court has assumed the adequacy of state time-limit and piecemeal litigation rules to support a federal bar, see, e.g., *Gray*, 518 U.S. at 161-2; *Boerckel*, 526 U.S. at ___. Although this Court inquires whether such rules are novel or enforced only irregularly, that inquiry safeguards primarily against invidious discrimination against federal claims or claimants. See, e.g., *Demorest v. City Bank Co.*, 321 U.S. 36, 42 (1944); *Rogers v. Alabama*, 192 U.S. 226, 231 (1904); see also *Howlett v. Rose*, 496 U.S. 356, 366 (1990). Here, there is no claim that Virginia's rules are *ad hoc* or pretextual in a way suggestive of improper discrimination. Nor, as argued above, does Section 2254(e)(2) contemplate any scrutiny along such lines anyway.

2261 et seq., Congress expressly set standards for the States to meet in their own proceedings in order to qualify for that Chapter's additional comity and finality protections. In contrast, Congress did not condition the operation of Section 2254(e)(2), in Chapter 153, in any similar way. If anything, Congress signaled an intent to impose the reforms in this area without regard to second-guessing the specific applications of State standards on a case-by-case basis. In the closely related provision strengthening the presumption of correctness for State court factfinding in Section 2254(e)(1), Congress deleted the earlier provisions making the presumption conditional on a State evidentiary hearing and the federal court's satisfaction with that hearing in each individual case. Cf. Former § 2254(d).

Finally, despite petitioner's claims and the assumptions in some of the federal cases he cites, an "evidentiary hearing" in either state or federal court should not be conceived as a discovery device to unearth "facts" not already alleged in the petition in the first place. The hearing should be a test of the truth of the allegations, if a test is shown to be necessary rather than merely academic, and not an expedition in search of new allegations and claims. E.g., *People v. Duvall*, 9 Cal.4th 464, 474 (1995) (court will dispose of habeas corpus petition without hearing if alleged facts, even if true, do not show prima facie case for relief); *Calderon v. United States District Court (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996) (pre-petition discovery improper as fishing expedition and as inconsistent with exhaustion doctrine); see also *Baja v. Ducharme*, 187 F.3d 1075, 1079 (9th Cir. 1999) (petitioner "failed" to first present State court with competent evidence supporting claims). It is ironic indeed that some of petitioner's cited federal court opinions,

upon expressing anachronistic suspicion of the States in deciding that § 2254(e)(2) ought not apply when the State does not afford an evidentiary hearing, themselves decline to order a federal evidentiary hearing on the prisoners' claims anyway. E.g., *Cardwell v. Green*, 152 F.3d 331, 337-8 (4th Cir. 1998); *McDonald v. Johnson*, 139 F.3d 1056, 1059-60 (5th Cir. 1998); *Burris v. Parke*, 116 F.3d 256, 259-60 (7th Cir. 1997). The idea that a federal habeas court should hold a hearing to "develop facts" would be antithetical to the exhaustion doctrine and the whole thrust of the AEDPA if that phrase connoted finding new facts, not presented to state court at least by way of corroborated allegations in a timely state habeas corpus petition.[3]

Section 2254(e)(2) Governs Claims of Suppression of Exculpatory Evidence

Petitioner claims that the State's conduct in this case went beyond mere stinginess with the public purse and state court discovery and hearing processes. He asserts, with no substantial foundation, that the State unconstitutionally withheld evidence material on the question of his guilt until it was too late for him to present it to Virginia's courts. Here, again, Virginia's brief on this topic shows that petitioner's cited evidence does not make out a case of a

[3] Although § 2254(e)(2) applies regardless of the federal court's view of whether the State affirmatively assisted the petitioner in preparing a sufficient case to trigger available State avenues of relief on his claims, amici also agree with Virginia that petitioner Williams in this case never demonstrated any basis for State assistance. See *Baja*, 187 F.3d at 1079.

constitutional violation, and that petitioner was dilatory in pursuing the claims he now says the evidence supports. (Resp. Br. 36-39, 48-49.)

It is not necessary, then, for this Court to reach any question of Section 2254(e)(2)'s operation in an instance of unconstitutional suppression of exculpatory evidence by the State. But, if the question were apt, the answer would still remain that—at least where the State contests the factual allegation—the normal operation of Section 2254(e)(2) ultimately might permit relief in such an instance, but only if the petitioner could meet the exceptions set out in subdivisions (A) and (B).

By its terms, as argued above, the provision would be triggered if, whatever the reason, the petitioner failed to develop the facts in state court. The statutory exceptions in (A) and (B) represent Congress' judgment about when such a claim merits an evidentiary hearing and possible relief. If Congress believed that unconstitutional interference by State officials amounted to a separate justification for an exception to this AEDPA habeas corpus reform, independent from an exception based on the bare unavailability of a claim to a diligent petitioner, it likely would have said so explicitly. That is what Congress did, for example, in setting out separate grounds for avoidance of the "statute of limitations" in new Section 2244(d)(1)(B, D). Petitioner and others second-guess the policy as "rewarding the State" for misconduct; but the policy choice was for Congress, which chose primarily to trust the State courts and rely on the exceptions contained in Section 2254(e)(2) as the backup federal guarantee against conviction of the innocent.

The accepted premise of this Court's own habeas corpus reforms, and those of Congress in the AEDPA, is that, at

some point, some claims by some petitioners will not be heard in federal court. Section 2254(e)(2) provides an avenue for relief for claims based upon new facts, not fairly presented to the State courts. That avenue is narrower than the one engineered in this Court's habeas corpus cases, but Congress has the right and the power to balance the competing interests—in comity, finality, federalism, fairness, accuracy, and risks to the innocent—in a different way. Congress did that generally in the AEDPA, and specifically in new Section 2254(e)(2)'s resistance to what often would be stale, albeit newly-asserted, evidence that would not promise a result more accurate than the one reached earlier, often many years earlier, at the time of trial. See *Herrera v. Collins*, 506 U.S. 390, 403-4 (1993).

No procedure is infallible. *Smith v. Robbins,* 528 U.S. ___, ___, n. 8, No. 98-1037 (January 19, 2000). The Constitution does not contemplate "rummaging" through the prosecutor's files at the time of trial. See *United States v. Robinson*, 585 F.2d 274, 281 (7th Cir. 1976) (en banc). And, under this Court's precedents, claims of unconstitutional suppression of evidence are not immune to being subjected to tougher federal-review rules if defaulted under state procedural law, *Gray*, 518 U.S. at 162, even though the petitioner might be made to bear the consequences of the incompetence of his state lawyer, see *Coleman,* 501 U.S. at 752. Section 2254(e)(2) represents Congress' considered judgment restricting federal evidentiary hearings to the rare case in which the petitioner makes sufficient showings of diligence and innocence.

In the case at bar, Section 2254(e)(2) precluded a federal evidentiary hearing unless petitioner met the statutory exceptions. As he acknowledges (Pet. Br. 25), he cannot

meet them. The Fourth Circuit was right in denying the writ without new federal factfinding.

CONCLUSION

For these reasons, the judgment of the Court of Appeals denying relief without an evidentiary hearing should be affirmed.

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APPENDIX

Alabama: Post-conviction review (Ala. Code. § 15-1-1 –15-24-34; Ala. R. Crim. P. 32.1); appointment of counsel (R. 32.7(c)("if necessary")).

Alaska: Post-conviction review (Ak. Stats. § 12-72-010); appointment of counsel (Ak. R. Crim. P. 35.1(e) ("shall be appointed" for indigent); discovery (R. 35.1(g) (generally pursuant to Ak. R. Civ. Pro. 26(b)).

Arizona: Post-conviction review (Az. R. Crim. P. 32.1); counsel (R. 32.4(c) ("shall" appoint for indigent in first petition); discovery (R. 32.3 (identifying post-conviction proceeding as part of criminal action), R. 15 (discovery available in criminal actions)).

Arkansas: Post-conviction review (Ark. R. Crim. P. 37.1); counsel (R. 37.3(b) (discretionary in non-capital cases), 37.5(b)(2) (mandatory in capital cases); discovery (R. 37.5(d) (by right in capital cases)).

California: Post-conviction review (Cal. Pen. Code §§ 1473 et seq.; Cal. Govt. Code, §§ 68660-68666 (capital case procedures); see *In re Clark*, 5 Cal.4th 750 (Cal. 1993)); counsel (*In re Saunders,* 21 Cal.4th 697, 717 n. 11 (Cal. 1997) (mandatory upon prima facie case); Cal. Govt. Code § 2265(b) (by right in capital cases)); discovery (*In re Gonzalez*, 51 Cal.3d 1179, 1258-61 (Cal. 1991) (discretionary upon prima facie case)).

Colorado: Post-conviction review (Colo. R. Crim. P. 35); counsel (Colo. Rev. Stats. Ann. § 21-1-104(1)(b)).

Connecticut: Post-conviction review (Conn. Gen. Stats. § 52-466)); counsel (§ 51-296) ("in any habeas corpus hearing"); discovery (Conn. Practice Book §§ 23-29, 23-38(a, c) (discretionary "as will enhance the fair and summary disposal of the case")).

Delaware: Post-conviction review (Superior Ct. Crim. R. 61); counsel (R. 61(e)) (discretionary, for good cause), R. 61(l)(3) (by right in capital cases); discovery (see *Dawson v. State,* 673 A.2d 1186, 1197-8 (Del. 1996) (upholding discretionary grant for "good cause," but noting no challenge made to authority under Rule 61).

***Florida*:** Post-conviction review (Fla. R. Crim. Pro. 3.850); counsel (R. 3.851(b)(3) (capital cases)); discovery (R. 3.852 (some in capital cases).

***Georgia**:* Post-conviction review (Ga. Stats. § 9-14-40 et seq.); counsel (see *Gibson v. Turpin*, 270 Ga. 855 (Ga. 1999) (no appointed counsel in habeas corpus cases, but "Resource Center" volunteer aid available in capital cases)); discovery (§ 9-14-48(a) (depositions and other discovery "upon leave of court")).

Hawaii: Post-conviction review (Ha. R. Penal P. R. 40(a)(2)); counsel (Rule 40(i) (unless petition patently frivolous); discovery (cf. R. 40(f)).

Idaho: Post-conviction review (Id. Code § 19-4901); counsel (§ 19-4904 (discretionary), § 19-2719A (apparently mandatory in capital cases); discovery (§ 19-4907(a) (civil discovery rules applicable)).

Illinois: Post-conviction review (I.L.C.S 5/122-1); counsel (§§ 122-2.1 (mandatory in capital cases), 122-4 (mandatory for non-frivolous petition in non-capital cases); discovery (*People ex rel. Daley v. Fitzgerald*, 123 Ill.2d 175 (Ill. 1988) (inherent judicial discretion to allow discovery depositions)).

Indiana: Post-conviction review (Ind. Crim. R. PC 1(1)); counsel (R. PC 1(2) (indigent referred to public defender); discovery (R. PC 1(5) (civil rules applicable)).

Iowa: Post-conviction review (Iowa Code Ann. § 822.2-822.3); counsel ("costs and expenses of legal representation shall . . . be made available"); discovery (§ 822.7 (all civil discovery available)).

Kansas: Post-conviction review (Kan. Stats. Ann. § 60-1507); counsel (§ 22-4506(b) (if "substantial issue of law or fact"); discovery (*Mebane v. State*, 21 Kan. App.2d 533 (Kan.App. 1995) (discretionary)).

Kentucky: Post-conviction review (Ky. Rev. Stats. § 419.020; Ky. R. Crim. P. 10.02, 11.42); counsel (R. 11.42(5) (if motion raises material fact)).

***Louisiana**:* Post-conviction review (La. Code Crim. P., arts. 924, 930)); counsel (art. 930.7 (discretionary)); discovery (art. 929, 930.7(B) (good cause)).

Maine: Post-conviction review (Maine Rev. Stats. Ann. §§ 2122, 2125); counsel (see § 2129(B) (for indigent)); *McEachern v. State*, 456 A.2d 886 (1983) (discretionary appointment "typically necessary" if petition not summarily dismissed)).

Maryland: Post-conviction review (Md. Code Ann., art. 27, § 645A); counsel (§ 645(A)(f)(1, 2)); Md. Rule 4-406 (entitlement on first petition, discretionary on reopening of prior petition)).

Massachusetts: Post-conviction review (Mass. R. Crim. Pro. 30(a)); counsel (R. 30(c)(5) (discretionary); discovery (R. 30(c)(4) (if prima facie case shown)).

Michigan: Post-conviction review (Mich. R. Crim. Pro. 6.502); counsel (R. 6.505A (discretionary, but mandatory for evidentiary hearing or oral argument); discovery (R. 6.508(A) (civil rules available)).

Minnesota: Post-conviction review (Minn. Stats. Ann. § 590.01); counsel (§ 590.05) (public defender may represent indigent); discovery (see § 590.04(3) (contemplating depositions)).

Mississippi: Post-conviction review (Miss. Stats. §§ 99-39-1, 99-39-5); counsel (§ 99-39-23(1) (discretionary in case of evidentiary hearing)); discovery (§ 99-39-15(1), 23(3) (good cause)).

Missouri: Post-conviction review (Mo. Supreme Ct. R. 29.15); counsel (R. 24.035(a), 24.036(a), 29.15(a); Mo. Rev. Stats. Ch. 600 (public defender); discovery (civil rules).

Montana: Post-conviction review: (Mont. Code. Ann. § 46-21-101); counsel (§ 46-21-201(2, 3) mandatory in capital cases; court shall appoint in non-capital case if hearing needed or if required by interests of justice)); discovery (§ 46-21-201(4) (for good cause)).

Nebraska: Post-conviction review (Neb. Rev. Stats. § 29-3001); counsel (§ 29-3004) (may appoint two)).

Nevada: Post-conviction review (Nev. Rev. Stats. § 34.724); counsel (§ 34.750(1) (discretionary if non-capital petition not summarily dismissed), § 34.820 (by right in capital cases)); discovery (§ 34.780) (civil discovery rules applicable)).

New Hampshire: Post-conviction review (N.H. Rev. Stats. Ann. 534:1).

New Jersey: Post-conviction review (N.J. R. Crim. P. 3:22-(1-3)); counsel (R. 3:22-6) (public defender for indigent); discovery (see *State v. Marshall*, 148 N.J. 89, 267 (N.J. 1997) (extending to post-conviction case rule that "courts have 'inherent power to order discovery when justice so requires'")).

New Mexico: Post-conviction review (N.M. Stats. Ann. § 31-11-6); counsel (§ 31-11-6(b) (mandatory unless motion conclusively shows no merit).

New York: Post-conviction review (N.Y. Crim. P. Law §§ 440.10, 440.20, 440.30); counsel (N.Y. Jud. Law § 35-b (by right in capital cases)).

North Carolina: Post-conviction review (N.C. Gen. Stats. § 15A-1414, 1415); counsel (§ 451(c) (two counsel by right for indigent capital petitioner), § 7A-451(a)(3) (counsel by right in non-capital cases)); discovery (§ 15A-1415(f) (access to complete law enforcement and prosecutorial files in capital cases; see § 7A-450(b); *State v. Tatum*, 291 N.C. 73 (1976) (indigent petitioners entitled to investigator as part of "necessary expenses of representation")).

North Dakota: Post-conviction review (N. Dak. Cent. C. § 29-32.1-01); counsel (§ 29-32.1-05 ("shall appoint" for indigent); discovery (§ 29-32.1-08) (for good cause)).

Ohio: Post-conviction review (Ohio Rev. Code, § 2953.21); counsel (Ohio Rev. Code § 2953.21 (capital cases); *State v. Crowder*, 573 N.E.2d 652 (1991) (public defender may represent petitioner in non-capital cases if issues have arguable merit).

Oklahoma: Post-conviction review (Ok. Stats., tit. 22, ch. 18, §§ 1080 et seq. (all cases), § 1089 (capital cases)); Ok. R. Ct. Crim. App. 9.7 (capital cases); counsel (§§ 1082 ("if necessary," non-capital cases), 1089(B) (indigent defender appointment by right in capital case)); discovery (§ 1089(D)(3) (capital cases); see § 1088.1(a)(3)(non-capital cases)(contemplating "discovery")).

Oregon: Post-conviction review (Ore. Rev. Stats. § 138.510); counsel (§ 138.590(1-4) (mandatory for indigent).

Pennsylvania: Post-conviction review (42 Pa. Consol. Stats. Ann.§§ 9541 et seq.; Pa. R. Crim. P. 1500 et seq.); counsel (R. 1504(a) (by right for indigent's first petition)); discovery (R. 1502(e)(1) (leave of court, for "exceptional circumstances" (non-capital cases), R. 1502(e)(2) (leave of court for "good cause" (first counseled capital petition)).

Rhode Island: Post-conviction review (R.I. Gen. Laws 10-9.1 et seq.); counsel (§ 10-9.1-5 (by right for indigent); discovery (§ 10-9.1-7 (civil discovery rules applicable)).

South Carolina: Post-conviction review (S.C. Code Ann. (1976) § 17-27-(10, 20)); counsel (§ 17-27-60; S.C. R. Civ. P. 71.1(d)) (mandatory for indigent and if hearing required), § 17-27-160 (two counsel by right in capital cases); discovery (§ 17-27-150 (civil rules discovery available in non-capital cases in court's discretion for good cause; civil discovery available by right in capital cases)).

South Dakota: Post-conviction review (S.D. Codified Laws § 21-27-1); counsel (§ 21-27-4 (by right)); see § 15-6-26(a) (civil discovery rules); *Reutter v. Meierhenry*, 405 N.W.2d 627, 629 (1987) (civil rules generally applicable in habeas corpus cases)).

Tennessee: Post-conviction review (Tenn. Stats. §§ 40-30-202, 40-30-207, 40-26-105, 29-21-101); counsel (§ 40-30-(206(e), 207) (by right for indigent)); discovery (§ 40-30-209 (pursuant to Tenn. Rules Crim. Pro. 16)).

Texas: Post-conviction review (Tex. Ann. Code of Crim. P. (Vernon's) § 11.070 et seq.); counsel (§ 11.071(c)) (by right in capital cases)); discovery (see § 11.07(d) (permitting interrogatories and depositions)).

Utah: Post-conviction review (Ut. Code Ann. § 77-35a-101 et seq.); counsel (§§ 78-35a-109 (discretionary, if motion in non-capital case not summarily dismissed),

§ 78-35a-202 (by right in capital case)); discovery (Ut. R. of Crim. P. 65C(l) (good cause).

Vermont: Post-conviction review (Vt. Stats. Ann. §§ 3952, 7132-3); counsel (§ 7137) (discretionary).

Virginia: Post-conviction review (Va. Code §§ 8.01.654); counsel (§ 19.2-163.7 (capital cases), see *Darnell v Peyton*, 160 S.E.2d 749 (1968) (entitlement for substantial or triable issues); discovery (Va. Sup. Ct. R. 4:1(b)(5) (leave of court in capital cases)).

Washington: Post-conviction review (Wash. Rev. Code § 4-76.080, 10-73.090); counsel (§ 10-73.150) (by right in capital cases, and if non-capital petition is not frivolous); discovery (*In re Gentry,* 137 Wash.2d 376, 391 (Wash. 1999) (if substantial likelihood discovery will lead to relief)).

West Virginia: Post-conviction review (W.Va. Code § 53-4A-1); counsel (§ 53-4A-4).

Wisconsin: Post-conviction review (Wis. Stats. Ann. § 782.01, 974.06); counsel (§ 974.06(3) (by public defender, if necessary). discovery (*State v. O'Brien*, 223 Wisc. 303, 323 (1999) (if relevant to issue presenting reasonable probability of different result)).

Wyoming: Post-conviction review (Wyo. Stats. § 7-14-101); discovery (§ 7-14-101(c) (civil discovery rules applicable)).